CASE NO. 92-1883

Supreme Court, U.S.
FILED
MAY 24 1993
OFFICE OF THE CLERK

IN THE
UNITED STATES SUPREME COURT
OCTOBER TERM, 1992

CHASE MANHATTAN BANK, N.A.,

Petitioner,

v.

VILLA MARINA YACHT HARBOR, INC.,
a/k/a VILLA MARINA YACHT HARBOUR, INC.,

Respondent.

Petition For Writ of Certiorari
To The United States Court of
Appeals for The First Circuit

PETITION FOR WRIT OF CERTIORARI

Michael J. Rovell
Law Offices of
Michael J. Rovell
Lisa I. Fair
55 West Monroe St.
Suite 3300
Chicago, IL 60603
(312) 578-9191

Paul E. Slater
(Counsel of Record)
Sperling, Slater &
Spitz
55 W. Monore St.
Suite 3300
Chicago, IL 60603
(312) 641-3200

Attorneys for Petitioners

QUESTIONS PRESENTED FOR REVIEW

(1) Whether defendant's due process right was violated by the district court when it entered orders sua sponte that (a) required defendant to pay into the district court past due and future mortgage payments under pain of contempt, and (b) denied him access to the judicial system by dismissing defendant's counterclaim and entering a judgment in favor of plaintiff for failure to make the payments, without providing defendant notice and an opportunity to be heard or to establish that it does not have the financial ability to comply.

(2) Whether the district court has inherent power to enter an order requiring defendant to make payments into court in contravention of the specific provisions and safeguards provided by Rule 65 of the Federal Rules of Civil Procedure.

(3) Whether the First Circuit violated defendant's due process right by sua sponte assessing sanctions pursuant to Rule 38 of the Federal Rules of Appellate Procedure, not because the appeal raised frivolous issues, but because it found no purpose for the appeal, without providing defendant notice and an opportunity to be heard on these issues.

(3) Whether the First Circuit erred in finding there was no purpose to an appeal of an order requiring defendant to pay past due and future mortgage payments into court when (1) plaintiff had subsequent to the order requested that defendant be held in contempt for failure to pay; (2) plaintiff requested that judgment be entered in its favor and defendant's counterclaim be dismissed with prejudice for failure to pay; and (3) the district court after its order was affirmed dismissed defendant's

counterclaim for failure to make the payments although the counterclaim was previously found to be legally sufficient and entered judgment in favor of plaintiff although the court had previously held plaintiff was not entitled to a summary judgment.

TABLE OF CONTENTS Page

QUESTIONS PRESENTED FOR REVIEW . . . i

TABLE OF CONTENTS. iv

TABLE OF AUTHORITIES vi

OPINIONS BELOW 1

JURISDICTION 2

STATUTES 3

STATEMENT OF THE CASE. 4

REASONS FOR GRANTING THE WRIT . . . 10

ARGUMENT 12

CONCLUSION 28

APPENDIX

1. February 2, 1993 Opinion of the United States Court of Appeals for the First Circuit. A1

2. March 11, 1993 Order of the United States Court of Appeals for the First Circuit on attorneys fees to be charged appellant. . A14

3. September 25, 1992 Order of the United States Court of Appeals for the First Circuit requesting briefing on jurisdiction A17

4. May 18, 1992 Opinion of of the United States District Court for the District of Puerto Rico . A19

5. July 1, 1992 Amended Order of the United States District Court for the District of Puerto Rico . A30

6. April 23, 1993 Order of the United States District Court for the District of Puerto Rico requiring deposit of funds within 12 days. . . A32

7. May 10, 1993 Judgment of the United States District Court for the District of Puerto Rico. A34

8. February 23, 1993 Order of the United States Court of Appeals for the First Circuit denying petition for rehearing A35

TABLE OF AUTHORITIES

CASES — Page

Alberti v. Cruise, 383 F.2d 268 (4th Cir. 1967) 21

Bogosian v. Woloohojian Realty Corp., 923 F.2d 898 (1st Cir. 1991) 8

Boddie v. State of Connecticut, 401 U.S. 371 (1971) 18

Connecticut v. Doehr, 111 S.Ct. 2105 (1991) 16

Farrell v. Danielson, 296 F.2d 39 (9th Cir. 1961). 22

Fuentes v. Shevin, 407 U.S. 67 (1972). 16

Hux v. Murphy, 733 F.2d 735 (10th Cir. 1984). 18

In re Arthur Treacher's Franchisee Litigation, 689 F.2d 1137 (3rd Cir. 1982). 20

In re Feit & Drexler, Inc., 760 F.2d 406 (2d Cir. 1985) . . 12

Inter-Regional Financial, Inc. v. Hashemi, 562 F.2d 152 (2d Cir. 1977). 12

Los Angeles Trust D. & Mtg. Exch. v. Securities & E. Comm., 264 F.2d 199 (9th Cir. 1959) 21

Messere v. Fair, 752 F. Supp.

48 (D. Mass. 1990). 17

Mid-State Homes, Inc. v. Portis, 652 F. Supp. 640 (W.D. La. 1987) 19

Morelle v. James, 810 F.2d 344 (2nd Cir. 1987) 17,18

Phillips v. Chas. Schreiner Bank, 894 F.2d 127 (5th Cir. 1990). . 20

Simmons v. Dickhaut, 804 F.2d 182 (1st Cir. 1986) 17,18

Sniadach v. Family Finance Corp., 395 U.S. 337 (1969) 16

Storage Technology v. U.S.D.C. for D. of Col., 934 F.2d 244 (10th Cir. 1991) 22

Teradyne, Inc. v. Mastek Corp., 797 F.2d 43 (1st Cir. 1986) . . 13

Valenzuelo-Gonzalez v. U.S.D.C. for D. of Arizona, 915 F.2d 1276 (9th Cir. 1990). 232

Weitzman v. Stein, 897 F.2d 653 (2nd Cir. 1990) 20

Windsor v. McVeigh, 93 U.S. 274 (1876). 16

Zebrowski v. Hanna, 973 F. 2d 1001, 1st Cir. 1992. 13

OPINIONS BELOW

The May 18, 1992 opinion of the United States District Court for the District of Puerto Rico (Cerezo, J.) declining to follow Magistrate Judge Arenas's recommendation and denying plaintiff's motions for summary judgment and dismissal of defendant's counterclaim is unreported and contained in the Appendix to this brief at A-19. The district court's order of July 1, 1992 containing a one sentence addendum to the May 18, 1992 order requiring the deposit of mortgage payments with the district court which is the subject matter of the appeal is unreported and contained at A-30. The First Circuit's February 2, 1993 opinion dismissing the appeal and awarding sanctions against defendant pursuant to Federal Rule of Appellate Procedure 38 is reported at 984 F.2d 546 and contained at A-1. The district court's order of April 23, 1993 giving defendant twelve days

after notice to pay into court all past due mortgage payments with interest or have judgment entered against it and its counterclaim dismissed is unreported and contained at A-32. The district court's order of May 10, 1993 dismissing defendant's counterclaim and granting plaintiff judgment for the arrearages is unreported and contained at A-34.

JURISDICTION

On February 2, 1993, the United States Court of Appeals for the First Circuit issued an opinion affirming the district court's July 1, 1992 order requiring the deposit of past due and future mortgage payments in the court. On February 23, 1993, the First Circuit denied defendant's motion for rehearing. Jurisdiction of this Court to review the First Circuit's order by writ of certiorari arises under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The constitutional provision involved in this petition is the Fifth Amendment to the United States Constitution which provides in relevant part:

> No person shall be . . . deprived of life, liberty, or property, without due process of law . . . .

The Federal Rule of Civil Procedure involved is Rule 65 which provides in relevant part:

> (a)(1) Notice. No preliminary injunction shall be issued without notice to the adverse party.
>
> * * *
>
> (d) Form and Scope of Injunction or Restraining Order. Every order granting an injunction and every restraining order shall set forth the reasons for its issuance . . . .

The federal statute involved is 18 U.S.C. § 1292(a)(1) which provides in relevant part:

> Except as provided in subsections (c) and (d) of this

> section, the courts of appeals shall have jurisdiction of appeals from: Interlocutory orders of the district courts of the United States . . . or of the judges thereof, granting . . . injunctions . . . .

STATEMENT OF THE CASE

Chase Manhattan Bank, N.A. ("Chase") filed suit on November 22, 1991 in an action entitled The Chase Manhattan Bank, N.A. v. Villa Marina Yacht Harbor, Inc., No. 91-2464, to foreclose on the mortgage of Villa Marina Yacht Harbour, Inc. ("Villa Marina")[1] based on an alleged default and to obtain the appointment of a receiver. (Record ("R.") 1.) The trial court referred the receiver issue to Magistrate Judge Arenas for report and recommendation. Villa Marina filed its opposition to the appointment of a receiver on December 27, 1991 and, on January 10, 1992, filed an Answer and

---

[1]There are no parent or subsidiary companies of the plaintiff corporation.

Counterclaim (R. 21 and 39) for bad faith termination of the mortgage and breach of its duty of good faith and fair dealing to Villa Marina by manufacturing a fictitious default and filing the foreclosure action in violation of its own internal manual, rules, regulations and practices.

On March 5, 1992, Magistrate Arenas, without hearing evidence or making findings of fact, issued an order appointing a receiver. (R. 78.) Villa Marina filed an Emergency Petition for Writ of Mandamus, Petition for Stay, and Motion to Vacate the order appointing the receiver. On May 4, 1992, Judge Cerezo vacated Magistrate Judge Arenas's order characterizing it as "ultra vires" and "beyond both the scope of our referral and the scope of his statutory powers." (R. 82.) After a de novo review, the court denied Chase's motion for receiver.

Before the motion for receiver was

decided, Chase filed a motion for judgment on the pleadings or, in the alternative, summary judgment and also moved to dismiss the counterclaim. (R. 44 and 55.) Villa Marina opposed both motions. Magistrate Judge Arenas recommended that summary judgment be granted and that the counterclaim be dismissed. (R. 87.) The district court, on May 18, 1992, in a strongly worded opinion, overruled the Magistrate's recommendations and found that the Magistrate:

> seems to find that Chase is entitled to a judgment of default because of Villa Marina's failure to consign with the Court the two rejected payments. This, however, is neither the basis upon which default was requested nor grounds for default within the terms of the contract.

(A-25.) The district court specifically found that Chase was not entitled to

summary judgment as Villa Marina had stated a claim against Chase.

On July 1, 1992, the district court amended its Order of May 18, 1992 to add the following paragraph:

> Defendant shall deposit with the Clerk of the Court, within ten (10) days after notice, the past due mortgage payment and shall continue making such deposits as the payments come due for the duration of the litigation of this case. The Clerk shall deposit them in an interest-bearing account.

(A-30-31.) This amended order was issued by the court sua sponte without any opportunity for defendant to be heard.

Villa Marina, on July 16, 1992, filed a Motion to Amend or Alter the Order of July 1, 1992. (R. 165.) On August 5, 1992, the district court denied Villa Marina's motion by noting "Denied" on the

front page of the motion. (R. 181.) Chase filed a petition for rule to show cause on August 31, 1992 when the payments were not made. (R. 182.)

Villa Marina timely filed its Notice of Appeal as to both the July 1, 1992 and August 5, 1992 Orders under 28 U.S.C. § 1292(a)(1) which permits appeals of injunctions. However, because there was a question as to whether these orders were appealable in that form, Villa Marina filed a Petition for Writ of Mandamus on September 8, 1992. (R. 190.)

On September 25, 1992, the First Circuit directed the parties' attention to Bogosian v. Woloohojian Realty Corp., 923 F.2d 898 (1st Cir. 1991), and requested the parties to address whether the order of July 1, 1992 was appealable as an injunction. (A-17-18.) The court then consolidated the appeal and petition for a writ of mandamus. On February 2, 1993,

the First Circuit affirmed the district court's orders and awarded sanctions against Villa Marina holding it had "advanced no plausible reason for this appeal." (A-13.) Villa Marina filed a motion for rehearing which was denied. (A-35.)

On remand, Chase filed a motion for rule to show cause and defendant filed a motion to stay execution of the May 18 order. On April 26, 1993, the district court filed an order giving defendant twelve days after notice to deposit the funds (now in excess of $300,000) in court or judgment would be entered in favor of Chase and defendant's counterclaim would be dismissed with prejudice. (A-32-33.)

On May 10, 1993, defendant filed a timely motion for reconsideration pursuant to Rule 59(e). On that same day (10th calendar day after notice), the court entered an order awarding plaintiff

judgment for all arrearages and dismissed defendant's counterclaim. (A-34.)

REASONS FOR GRANTING THE WRIT

This petition raises a host of important constitutional and policy issues. The petition should be granted to (1) resolve the conflict between the First and Second Circuits as to whether an order to deposit money into court is appealable; (2) determine whether the district court can use its inherent power to enter "administrative orders" in contravention of the specific mandate of the Federal Rules of Civil Procedure and do so sua sponte without providing the adverse party an opportunity to be heard; and (3) determine whether the First Circuit can sua sponte award sanctions on the basis that it saw no "plausible reason for this appeal" when (a) the reason for the appeal had never been questioned by plaintiff or the court, (b) defendant had not been

given an opportunity to respond, and (c) the record reflected that plaintiff had sought judgment and a dismissal of defendant's counterclaim for its failure to post the funds and, indeed, such an order was later granted in part.

This Court's intervention is necessary to prevent a gross miscarriage of justice and to suppress the concept that a litigant can be deprived of his day in court because of his inability to post substantial sums without ever having been given the opportunity to contest the requirement that any sums be paid or demonstrate the lack of ability to pay. The decision of the district court and First Circuit provide a guide for depriving deserving litigants of access to the judicial system based solely on wealth or the lack thereof.

ARGUMENT

I.

THE ORDER OF JULY 1, 1992 WAS APPEALABLE

The Second Circuit has expressly held that an order requiring a litigant to place property into custody is appealable as an injunction. In re Feit & Drexler, Inc., 760 F.2d 406 (2d Cir. 1985). The Second Circuit held that an order requiring defendant to place property in the custody of her own attorney was appealable as an injunction.

Similarly, in Inter-Regional Financial, Inc. v. Hashemi, 562 F.2d 152 (2d Cir. 1977), cert. denied, 434 U.S. 1046 (1978), the Second Circuit held that an order requiring property to be delivered to the custody of the clerk is appealable as an injunction.

The First Circuit's decision in this case is not only at odds with the Second

Circuit's decision, but at odds with its own decision in Teradyne, Inc. v. Mastek Corp., 797 F.2d 43 (1st Cir. 1986), where the First Circuit found that an order requiring placement of four million dollars in an interest-bearing account pending the outcome of the proceeding was appealable.[2]

II.

DUE PROCESS REQUIRES THAT DEFENDANT BE GIVEN AN OPPORTUNITY TO BE HEARD PRIOR TO THE ENTRY SUA SPONTE OF AN ORDER REQUIRING DEFENDANT TO POST PAYMENTS INTO COURT WHICH IT CANNOT AFFORD ON PAIN OF BEING HELD IN CONTEMPT OR HAVING JUDGMENT ENTERED AGAINST IT AND HAVING ITS COUNTERCLAIM DISMISSED

On May 18, 1992, the district court entered an opinion and order holding that Chase was not entitled to summary judgment and defendant's counterclaim for $1

[2]Zebrowski v. Hanna, 973 F.2d 1001 (1st Cir. 1992) is not on point as the defendant there had entered into an agreement to make a mortgage payment into court.

million stated a claim upon which relief can be granted. (A-29.) At the time that that order was entered, it disposed of all motions then pending before the court.

On July 1, 1992, the district court entered a memorandum order amending its order of May 18, 1992 to provide:

> Defendant shall deposit with the Clerk of the Court, within ten (10) days after notice, the past due mortgage payment and shall continue making such deposits as the payments come due for the duration of the litigation of this case. The Clerk shall deposit them in an interest-bearing account.

(A-30-31.)

The relief afforded by the "amendment" had never even been requested by Chase. The lowest appraisal of the property at issue provided Chase with over $6 million in equity. The propriety of

the amendment has never been litigated and the order was entered without regard to whether defendant had the ability to pay. Moreover, the order was silent as to what would in the event of non-compliance. That question, however, was later answered when the court entered its order of April 26, 1993 ruling that judgment would be entered for Chase and defendant's counterclaim would be dismissed if the payments were not made. Ultimately, by order of May 10, 1993, the counterclaim was dismissed and judgment entered for the claimed arrearages.

It cannot seriously be contested that requiring defendant to initially post with the court and now give to plaintiff in excess of $300,000 is the taking of one's property. So, too, is the dismissal of a lawsuit which the district court explicitly held to have stated a claim for $1 million upon which relief can be

granted. (A-29.)

Nor does anyone contend that defendant had been given notice of the relief ordered or an opportunity to be heard prior to the entry of the July 1 order.

It has long been held by the Court that notice and an opportunity to be heard are fundamental ingredients of due process. Windsor v. McVeigh, 93 U.S. 274 (1876).

This Court has been vigilant in insuring that a litigant be given notice and an opportunity to be heard prior to the deprivation of the right. Connecticut v. Doehr, 111 S.Ct. 2105 (1991); Fuentes v. Shevin, 407 U.S. 67 (1972), Sniadach v. Family Finance Corp., 395 U.S. 337 (1969).

Here, the order not only results in a deprivation of due process for failure to provide notice and an opportunity to be

heard, but deprives defendant of a judicial forum based upon his lack of ability to pay the required sums into court or to Chase.

It has been widely recognized that the right of access to the judicial system is a discrete, fundamental constitutional right. See, e.g., Morelle v. James, 810 F.2d 344 (2nd Cir. 1987) (allegations by prisoner that his pro se brief for appeal had been taken by corrections officers adequately stated a claim for unconstitutional denial of his right to access); Simmons v. Dickhaut, 804 F.2d 182 (1st Cir. 1986)(court found prisoners' allegations that prison officials withheld his legal materials stated a cause of action under Sec. 1983 for an intentional violation of his right of access to the courts); Messere v. Fair, 752 F. Supp. 48 (D. Mass. 1990) (holding prisoner denied his constitutional right

of access to the courts by failure of Connecticut prison to provide him with adequate legal assistance in its law library facilities). The sources of the right to access include the First Amendment, the Due Process Clauses of the Fifth and Fourteenth Amendments, and the Privileges and Immunities Clause of Article IV, section 2. Morelle, 810 F.2d at 346, and Simmons, 804 F.2d at 183.

Moreover, it has been held unconstitutional to deprive a litigant of access to the judicial system based upon an inability to pay. See, e.g., Boddie v. State of Connecticut, 401 U.S. 371, 377 (1971) (indigent welfare recipients seeking to file divorce actions in state court, but unable to pay required court fees, found deprived of their due process right to be heard); Hux v. Murphy, 733 F.2d 735, 737 (10th Cir. 1984) (district court's order requiring full payment of

filing fees violated appellant's right to file in forma pauperis and unduly impaired appellant's constitutional right of access to the courts); Mid-State Homes, Inc. v. Portis, 652 F. Supp. 640, 645 (W.D. La. 1987)("A state may not deny any person an opportunity to be heard by interposing substantial fees as a barrier to access to the courts").

In the case at hand, the Defendant is likewise unconstitutionally being deprived of his right of access to the judicial system due to his inability to pay as required by the order of July 1, 1993.

III.

THE COURT HAS NO INHERENT POWER TO ORDER AN INJUNCTION WITHOUT COMPLYING WITH RULE 65

Rule 65(a) of the Federal Rules of Civil Procedure provides that before an injunction can be issued, the adverse party is entitled to notice and an

opportunity to be heard. Here, no motion was ever filed requesting the injunctive order. No notice was given. No hearing was held.

The courts appear to be unanimous in reversing injunctions entered without notice. See, e.g., Weitzman v. Stein, 897 F.2d 653 (2nd Cir. 1990) (sua sponte order requiring party to hold and maintain assets within her control was considered an injunction and vacated because it was issued without notice); Phillips v. Chas. Schreiner Bank, 894 F.2d 127 (5th Cir. 1990) (injunction precluding bank from pursuing foreclosure remedies was vacated because the injunction was issued sua sponte, the enjoined party had not received notice, and the enjoined party only learned of the issue when it received the order in the mail); In re Arthur Treacher's Franchisee Litigation, 689 F.2d 1137 (3rd Cir. 1982) (sua sponte

injunction directing franchisee to pay franchisor all past-due royalties vacated because it was issued without notice).

The same rule provides that the court must set forth the specific facts on which it is relying in issuing the injunction. This too was not done. Again, the lower courts appear to be unanimous in reversing injunctions granted without specifying the reasons. See, e.g., Alberti v. Cruise, 383 F.2d 268, 272 (4th Cir. 1967) (injunction granted for conclusory reason that it appeared plaintiff was harassing defendant held vacated for failure of district court judge to state valid reason for issuance of injunction); Los Angeles Trust D. & Mtg. Exch. v. Securities & E. Comm., 264 F.2d 199, 205 (9th Cir. 1959) (in action to enjoin sale of certain alleged securities, order granting preliminary injunction set aside for failure of district court to set forth

specific reasons for issuance); Farrell v. Danielson, 296 F.2d 39, 42 (9th Cir. 1961) (injunction restraining defendants from use of concealed funds and property in their possession set aside for failure of district court to set forth the reason for its issuance).

Finally, the uses of the word "shall" in Rule 65 appear to be dispositive of the argument that the court does not have the inherent power to enter the July 1 order. Rule 65 states that notice and reasons "shall" be given before an injunction may issue. The district court's order was therefore contrary to a clear, explicit prohibition. In this context, reviewing courts have not hesitated to issue writs of mandamus to lower courts who have ignored their mandate of "shall." See e.g., Storage Technology v. United States Dist. Ct. for Dist. of Colo., 934 F.2d 244, 247 (10th Cir. 1991) (petition for

mandamus granted where district judge failed to abide by procedural rule providing that the notice of appeal shall contain the names of all parties to the judgment"); Valenzuelo-Gonzalez v. United States Dist. Ct. for Dist. of Ariz., 915 F.2d 1276, 1280 (9th Cir. 1990) (writ of mandamus issued where district court violated clear mandate in Federal Rules of Criminal Procedure 10 and 43(a), which both require that a defendant "shall" be present at the arraignment).

IV.

THE FIRST CIRCUIT'S SUA SPONTE AWARD OF SANCTIONS DENIED DEFENDANT DUE PROCESS AND WAS IN AND OF ITSELF ERRONEOUS

Plaintiff at no time requested sanctions against defendant for filing the appeal. No claim was made by plaintiff that the appeal was frivolous or that the arguments advanced were improper. No claim was made by defendant that there was an improper purpose for the appeal or that

the appeal lacked a purpose. Nevertheless, without even giving defendant an opportunity to know that this issue was being heard, the First Circuit awarded sanctions "[B]ecause Villa Marina has advanced no plausible reason for this appeal." (A-13.)

On August 31, 1992, plaintiff filed a petition for rule to show cause in the district court as to why defendant should not be held in contempt and requested judgment in plaintiff's favor and dismissal of defendant's counterclaim for its failure to pay in excess of $100,000 into court. That motion was not ruled upon while the case was before the First Circuit.

On February 2, 1993, the First Circuit not only dismissed the appeal but sua sponte entered sanctions against defendant under Rule 38 "[b]ecause Villa Marina ha[d] advanced no plausible reason

for this appeal."[3] (A-13.) Chase had not requested any sanctions and the "reason for the appeal" had theretofore never been questioned. Defendant's petition for rehearing was denied. Defendant filed a motion for stay of the mandate pending the filing of this petition for a writ of certiorari which was denied without prejudice to making an application for stay of execution in the district court.

The finding that Villa Marina had not asserted a plausible reason for this appeal overlooks the fact that Villa Marina was nowhere asked by the court or challenged by Chase to assert a reason for the appeal. Had Villa Marina known that the issue was to be considered by the court, Villa Marina would have adduced proof that the filing of the foreclosure

---

[3]While Chase requested approximately $20,000 in fees. The First Circuit awarded approximately $9,000. (A-16.)

substantially decreased not only the value of Villa Marina, but also its cash flow. Villa Marina, according to its appraisal, has a value in excess of $12 million and a value according to Chase's own appraisal of $7 million. Villa Marina thus still had substantial equity to support another mortgage. The foreclosure action, as a practical matter, was the "death knell" of any further subordinated borrowing.

Chase remains over-secured by millions of dollars while depriving Villa Marina of its equity at least in terms of credit and requiring Villa Marina to deposit the mortgage payments into court to provide yet another source of repayment if Chase succeeds. Indeed, Villa Marina was prepared to make the payment to Chase if Chase dropped its foreclosure action. If Chase had done so, Villa Marina's borrowing power would have been restored. Of course, all of this is dehors the

record as Villa Marina never had an opportunity to argue this position below or know it was relevant here.

Finally, Villa Marina could not pay as its assets had been attached by the RTC in a matter entitled RTC v. Oriental Plaza, Inc., et al., No. 92-2094, pending in the United States District Court for the District of Puerto Rico. Of course, this too was dehors the record but could have been included as part of the record had Villa Marina known that this issue was being considered. The First Circuit, in criticizing defendant for the use of the word "windfall," rightly pointed out that the money was to be posted with the Clerk, not Chase. Implicit was the concession that had the funds gone to Chase it would have been a "windfall" and presumably the appeal would have even under the First Circuit's strictures been proper. Ironically, in the district court's May

10, 1993 order, judgment was entered in favor of Chase for the arrearages.[4] Thus, the district court has provided the windfall that the First Circuit was so careful to eschew. While counsel was not prescient, it was not a quantum leap of faith to predict that such an order might be entered given Chase's motion in the district court that pended during the appeal and sought judgment in its favor as a result of defendant's failure to post the funds with the court.

The appeal therefore had a substantial purpose. Villa Marina was deprived of due process when it was not permitted to impart this purpose to the court.

CONCLUSION

For the reasons set forth above, petitioner respectfully requests this

---

[4]The court has stayed its judgment for the present time.

Court to grant its petition for writ of certiorari.

Respectfully submitted,

MICHAEL J. ROVELL
PAUL E. SLATER
(Counsel of Record)
LISA I. FAIR

Attorneys for Petitioner

Dated: May 24, 1993

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 92-2041

IN RE

VILLA MARINA YACHT HARBOR, INC.
Petitioner

No. 92-2051

CHASE MANHATTAN BANK, N.A.
Plaintiff, Appellee,

v.

VILLA MARINA YACHT HARBOR, INC.
A/K/A VILLA MARINA YACHT HARBOUR, INC.
Defendant, Appellant

APPEALS FROM THE UNITED STATES
DISTRICT COURT

FOR THE DISTRICT OF PUERTO RICO

[Hon. Carmen C. Cerezo,
U.S. District Judge]

Before

Selya, Circuit Judge,
Bownes, Senior Circuit Judge,
and Cyr, Circuit Judge.

Michael J. Rovell, with whom Lisa I. Fair, Robert E. Bull, Law Offices of Michael J. Rovell, Carlos G. Latimer, and Latimer, Biaggi, Rachid, Rodriguez, Suris & Godreau were on brief, for appellant.

Jay A. Garcia-Gregory, with whom Rafael R. Vizcarrondo, Heriberito J. Burgos-Perez and Fiddler, Gonzalez & Rodriguez were on brief, for appellee.

February 2, 1993

BOWNES, Senior Circuit Judge. This is an appeal by defendant-appellant Villa Marina Yacht Harbor, Inc. from the following order of the district court:

> Defendant shall deposit with the Clerk of the Court, within ten (10) days after notice, the past due mortgage payments and shall continue making such deposits as the payments come due for the duration of the litigation of this case. The Clerk shall deposit them in an interest-bearing account.

I.

Uncontested Facts

A statement of the uncontested facts leading to the order compels the

BEST AVA

conclusion that there is no merit to this appeal. On November 22, 1991, plaintiff-appellee, Chase Manhattan Bank, N.A., filed a complaint against Villa Marina. The complaint sought foreclosure of Chase's mortgage on Villa Marina property and the collection of monies allegedly due it from Villa Marina. Chase alleged, as one of the grounds for foreclosure, that Villa Marina failed to timely make the monthly mortgage payments due on October 1 and November 1, 1991. Chase also requested the appointment of a receiver; this request was referred to a magistrate judge.

Villa Marina filed an opposition to the appointment of a receiver on December 27, 1991. On January 10, 1992, it filed an answer and counterclaim. In its answer Villa Marina stated:

> . . . it is admitted that VILLA MARINA owes CHASE the principal sum and interest therein

LABLE COPY

> pleaded, minus the amounts that VILLA MARINA claims against CHASE in the Counterclaim and the amounts CHASE is retaining in its escrow account.

In its answer and counterclaim, Villa Marina alleged bad faith termination of the mortgage, breach of Chase's duty of good faith and fair dealing by creating a fictitious default, and filing the foreclosure action in breach of Chase's own internal manual, rules, regulations, and practices. Villa Marina estimated its damages as one million dollars.

On February 10, 1992, Chase moved for judgment on the pleadings pursuant to Fed. R. Civ. P. 12(c) and for dismissal of Villa Marina's counterclaim. Villa Marina objected to these motions. A hearing was held before the magistrate-judge on March 5, 1992 which encompassed all pending matters. On March 12, the magistrate-judge issued a report and recommended to the district court that it grant Chase's

motions for judgment on the pleadings and dismissal of the counterclaim. On the same day the magistrate-judge also issued an order appointing a receiver. Villa Marina promptly filed an emergency petition for writ of mandamus, petition for a stay of the orders, and a motion to vacate the appointment of the receiver.

By order dated May 4, 1992, issued on May 5, the district court vacated the magistrate-judge's appointment of a receiver because this action "was beyond both the scope of our referral and the scope of his statutory powers." The district court then considered the matter de novo. It held that "Chase has failed to meet the threshold requirements for granting the appointment of a receiver as an equitable remedy." On May 18, 1992, the district judge issued a six-page order in which she reviewed the report and recommendations of the magistrate. The

district court declined to follow the magistrate-judge's report and recommendations. It denied Chase's motions for judgment on the pleadings and dismissal of the counterclaim.

On July 1, 1992, the district judge, sua sponte, issued the order which is the basis of this appeal. Prior to that part of the order directing Villa Marina to make its monthly mortgage payments into court, the district judge stated:

> A review of our order entered on May 18, 1992 reveals that the last paragraph was inadvertently omitted. Accordingly, the May 18, 1992 order is amended to add the following: (Defendant ordered to make monthly mortgage payments into court).

On July 16, 1992, Villa Marina moved to amend or alter the district court order of May 18. The motion was denied on August 6, 1992, and entered on August 11. Villa Marina appealed the July 1 order of the district court and the court's denial

of its motion to amend or alter the order of May 18. Recognizing that there might be a question of appealability of these orders, Villa Marina also sought appellate review by filing a petition for writ of mandamus.[1]

II.

Analysis

The crux of Villa Marina's argument is that the district court lacked authority to issue the order requiring the deposit of the mortgage payments with the court. In its brief, Villa Marina asserts that it "is at a loss to find the jurisdictional basis for the order." [Appellant's Brief, p. 11], because there is no specific provision in the federal rules expressly authorizing its issuance and because the court acted without a

---

[1] Chase has suggested in its brief that Villa Marina's appeal was not timely filed. For purposes of this opinion we find that it was.

motion pending. This contention ignores the inherent power possessed by a district court, "not governed by rule or statute, to manage the litigation before it." Zebrowski v. Hanna, 973 F.2d 1001, 1003-04 (1st Cir. 1992). "[T]he rules of civil procedure do not completely describe and limit the power of district courts . . . ." HMG Property Investors v. Parque Indus. Rio Canas, 847 F.2d 908, 915 (1st Cir. 1988) (quoting Brockton Savings Bank v. Peat, Marwick, Mitchell & Co., 771 F.2d 5, 11 (1st Cir. 1985), cert. denied, First United Fund, Ltd. v. Brockton Savings Bank, 475 U.S. 1018 (1986)). The district courts "retain the inherent power to do what is necessary and proper to conduct judicial business in a satisfactory manner." Aoude v. Mobil Oil Corp., 892 F.2d 1115, 1119 (1st Cir. 1989). This inherent power is "rooted in the chancellor's equity powers[] to process

litigation to a just and equitable conclusion." Id. (citation omitted).

We have repeatedly recognized this inherent power of the district court as encompassing the power to order various types of "administrative" actions: to require the posting of security for costs when warranted by the circumstances of a case, Aggarwal v. Ponce School of Medicine, 745 F.2d 723, 726 (1st Cir. 1984), Hawes v. Club Escuetre El Commandante, 535 F.2d 140, 143 (1st Cir. 1976); to modify discovery-related protective orders for so long as such order is in effect, Public Citizen v. Liggett Group, Inc., 858 F.2d 775, 782 (1st Cir. 1988)), cert. denied, 488 U.S. 1030 (citing various other jurisdictions as support for same proposition); to reconsider its orders, Burns v. Watler, 931 F.2d 140, 145 (1st Cir. 1991)); to stay pending litigation when efficacious

management of docket reasonably requires, Marquis v. F.I.D.C., 965 F.2d 1148, 1154-55 (1st Cir. 1992); to permit jury view of places or objects outside the courtroom, United States v. Passos-Paternina, 918 F.2d 979, 986 (1st Cir. 1990), cert. denied, 111 S.Ct. 1637, 111 S.Ct. 2808, 111 S.Ct. 2809 (1991); to fashion appropriate sanctions for abuses of the judicial process, including dismissal, Zebrowski v. Hanna, 973 F.2d at 1003-04, R.W. International Corp. v. Welch Foods, Inc., 937 F.2d 11, 19-20 (1st Cir. 1991).

In deciding the propriety of the order at issue here, we accept the district court's statement that the pay-into-court order of July 1 was inadvertently omitted from its order of May 18. The May 18 order makes it unmistakenly clear that the issues in controversy between the parties, including those raised in Villa Marina's

counterclaim, will be tried on the merits. In light of Villa Marina's explicit admission in its answer that "it owes Chase the principal sum and interest therein pleaded," an order directing it to deposit the monthly mortgage payments into an interest-bearing court account as they become due would not be unusual; in fact, it would be routine. We hold that the July 1 amendment was wholly within the inherent administrative powers of the district court and did not constitute an abuse of discretion.

Even if, for purposes of this case, we view the order as a preliminary injunction,[2] as Villa Marina urges, there

---

[2]We need not consider whether the district court's order is, indeed an appealable injunction, and we express no opinion on that matter. Because the case is straightforward, and the party in whose favor the jurisdictional issue would operate is entitled to prevail on the merits, we elect to forgo unnecessary work and to bypass the question of appellate jurisdiction. See, e.g., Secretary of the

is no basis for overturning it. Indeed, we are at a loss to understand why Villa Marina opposes the order. Contrary to Villa Marina's assertion, it is not a "windfall" to Chase. The payments do not go to Chase; they go into an interest-bearing court account. Until the case is decided on the merits, neither Chase nor Villa Marina can use the money. And, if there had been no attempted foreclosure by Chase, wrongful or justified, Villa Marina would be making the monthly mortgage payments to Chase. Indeed, Villa Marina, in its motion to amend or alter the appealed order, stated explicitly:

> Villa Marina nevertheless is willing to post the funds directly to Chase if Chase reinstates the mortgage and Villa Marina is allowed to pursue its counterclaims. (footnotes not now pertinent)

Navy v. Avrech, 418 U.S. 676, 677-78 (1974) (per curiam); In re D.C. Sullivan Co., 843 F.2d 596, 598 (1st Cir. 1988).

As the case now stands, the mortgage continues in effect pending a hearing on the merits including the counterclaim. Villa Marina has received all it requested. The order is a paradigm case of preserving the status quo with no harm to either party pending a hearing on the merits.

Because Villa Marina had advanced no plausible reason for this appeal, we find it frivolous and award costs and attorney fees for this appeal to appellee Chase. Chase shall file its fee petition within the time fixed under, and in the form contemplated by, 1st Cir. Loc. R. 39.2.

So ordered.

UNITED STATES COURT OF APPEALS

FOR THE FIRST CIRCUIT

No. 92-2041

IN RE

VILLA MARINA YACHT HARBOR, INC.

Petitioner

No. 92-2051

CHASE MANHATTAN BANK, N.A.

Plaintiff, Appellee,

v.

VILLA MARINA YACHT HARBOR, INC.

A/K/A VILLA MARINA YACHT HARBOUR, INC.

Defendant, Appellant

BEFORE

Selya, Circuit Judge

Bownes, Senior Circuit Judge

and Cyr Circuit Judge

ORDER OF THE COURT

Entered: March 11, 1993

Order on appellee's attorney's fees to be charged to appellant.

It is not our concern what the attorneys for the appellee charge their client. It is our business, however, what amount of the attorney's fees submitted should be paid by the appellant. We do not think the appeal necessitated the work

of three partners in the law firm retained by appellee. We have, therefore, eliminated from the attorney's fees to be paid by appellant, the fees charged by attorneys Vizcarrondo and Burgos Perez. This means that the attorneys fees to be paid by appellant total $9,772.50.

By The Court

FRANCIS P. SCIGLIANO, CLERK

By: Daniel F. Loughry

Chief Deputy Clerk

[cc: Messrs. Rovell, Garcia-Gregory, Vizcarrondo, Burgos-Perez]

[Bull, Latimer and Ms. Fair]

UNITED STATES COURT OF APPEALS

FOR THE FIRST CIRCUIT

No. 92-2041

IN RE

VILLA MARINA YACHT HARBOR, INC.
Petitioner

No. 92-2051

CHASE MANHATTAN BANK, N.A.
Plaintiff, Appellee,

v.

VILLA MARINA YACHT HARBOR, INC.
A/K/A VILLA MARINA YACHT HARBOUR, INC.
Defendant, Appellant

ORDER OF COURT

Entered September 25, 1992

The petition for mandamus (92-2041) is consolidated with the appeal (92-2051). The two should be briefed together according to the briefing schedule set in 92-2051. In addition to the merits, the parties should address whether the July 1, 1992 order is appealable as an injunction.

See, e.g., Bogosian v. Woloohojian Realty Corp., 923 F.2d 898 (1st Cir. 1991).

By the Court:

Clerk

[cc: Messers. Bull, Burgos-Perez, Vizcarrondo, Garcia-Gregory]
Latimer and Rovell]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

CHASE MANHATTAN BANK ,

Plaintiff, ,

vs. , CIVIL 91-2464CCC

VILLA MARINA YACHT HARBOR, INC. ,

Defendant ,

O R D E R

This action is before us on Chase Manhattan Bank N.A.'s Motion for Judgment on the Pleadings and/or for Summary Judgment filed on February 10, 1992 (docket entry 13) and Motion to Dismiss Counterclaim filed on February 3, 1992 (docket entry 11) which were opposed by defendant Villa Marina Yacht Harbor, Inc. on March 10, 1992 (docket entry 22) and to which plaintiff replied on March 11, 1992 (docket entry 23).

Although these matters were not the subject of a referral by the undersigned, the Magistrate Judge saw fit to review the matter, and filed a report recommending that the Court enter partial judgment under Federal Rules of Civil Procedure granting the motion for judgment on the pleadings in the principal amount of $1,173,219.64 plus interests, and dismissing the counterclaim. The Magistrate stayed discovery because he did not find in all the information provided by the parties the need to conduct any discovery. In the event that we would see fit not to dismiss the counterclaim, the Magistrate recommended that partial judgment be nonetheless entered and execution stayed pending a possible set-off against the counterclaim.

The rationale for judgment on the pleadings, as set out by Chase in its motion, is as follows:

> 2. Villa Marina states: "... With respect to paragraph IV 8, the same allegation of the preceding paragraphs are made, but it is admitted that Villa Marina owes Chase the principal sum and interest therein pleaded, minus the amounts that VILLA MARINA claims against CHASE in the counterclaim and the amounts CHASE is retaining in its escrow account...."
>
> 3. On account of the above stated admissions by VILLA MARINA, judgment on the pleadings and/or summary judgment in favor of CHASE for the amounts claimed in the complaint is proper.

(Emphasis in the original.) Chase goes into a discussion of why the counterclaim should not bar entry of judgment on the foreclosure claim. Then, in the bleep of a word processor, plaintiff adds in paragraph 9: "...and since CHASE has filed the required sworn statement attesting to the fact that sums are liquid, due and owing, it is proper for this honorable court to enter judgment in

favor of CHASE for sums pleaded in the complaint."

The defendant's answer at Paragraph 5 denies the allegation of default contained in Section IV, Paragraph 1-7 of the complaint, accepts only the existence of the debt in Section IV Paragraph 8, and otherwise refutes the allegations of default offering by way of explanation that "any default alleged by CHASE has been manufactured by CHASE while acting in bad faith and with the intention to foreclose the marina." Plaintiff has conveniently ignored this paragraph of the Villa Marina's pleading, choosing to highlight only what is expeditious to its goal.

Chase's tidy sworn statement could be enough to support the typical default judgment that occurs in many foreclosure cases, and the fact that the existence of the debt is undisputed, the acceleration

of the payments due to default and propriety of this foreclosure attempt require something more than a bank officer's statement of the obvious; that a debt exists.

No specific facts in support of the alleged default events are set out, nor is any documentary evidence filed to support them. No comment is made with regard to the two affirmative defenses set forth by Villa Marina that the foreclosure was improper under Chase's own Rules and Regulations and custom and practice, and, that the escrow account more than covered the payment.

Additionally, a judgment on the pleadings must be denied if the facts of a legally sufficient affirmative defense are not controverted.

> One good defense will defeat recovery on a claim. Therefore, where a defendant pleads both a sufficient negative defense and a sufficient affirmative

> defense, plaintiff is entitled to summary judgment only in the event that there is no genuine issue of material fact as to both the negative and affirmative defenses and he is entitled to judgment as a matter of law. When these conditions are satisfied, summary judgment may properly go for the plaintiff, otherwise not.

6 Moore's Federal Practice, Section 56.17[4], at 56-377-378.

The Magistrate issued his Report and Recommendation on March 12, 1992. At page 4, the Magistrate recognized that "it is disputed that the entire debt is due and that defendant is in default. Defendant simply admits the principal debt with interest accruing but does not agree that it is in default of any debt."

Furthermore, in converting the motion under Rule 12(c) to one under Rule 56, no opportunity was given to Villa Marina to supplement its opposition or make

discovery related to its affirmative defenses.[3]

Although he quotes the alleged acts of default set out in the complaint, the Magistrate makes no findings of fact regarding any of them. Instead, he seems to find that Chase is entitled to a judgment of default because of Villa Marina's failure to consign with the Court the two rejected payments. This, however, is neither the basis upon which default was requested nor grounds for default within the terms of the contract.

---

[3]Rule 12(c) states, in pertinent part:

> If, on a motion for judgment on the pleadings, matters outside the pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such motion by Rule 56.

DISMISSAL OF COUNTERCLAIM

With regard to the counterclaim, the Magistrate Judge recommends that it be granted. He reasons as follows:

> Lengthy and detailed as the counterclaim and the reply to the motion to appoint receiver are, they are reduced to complaints about the facts of the complaint and all of the motivations behind it. With all of the allegations of dolus and tortious conduct including the Chase's failure to follow its own guidelines, defendant alleges no more than the filing of this lawsuit and an arbitrary figure of $1,000,000 in terms of damages which it has suffered due to Chase's conduct.

Plaintiff's Motion to Dismiss the Counterclaim rests exclusively in the characterization of the cause of action as being one for "malicious prosecution" or "abuse of process." Chase analyzes the intricacies and limitations of such actions, and attempts to demonstrate that Villa Marina's cause of action does not fall within the strict limitations, as

they are interpreted by Chase itself. The abuse of process, however, is merely one in a series of allegedly tortious acts which Villa Marina alleged Chase deliberately committed out of spite and ill will, and which would be actionable under Article 1802 of the Civil Code of Puerto Rico.

Defendant contends that the foreclosure violates Chase's own internal manuals, rules, regulations and customary practices which should be considered as implied conditions in the contractual relationship. Moreover, it is plead that the action was taken with the intent to injure Villa Marina.

That Villa Marina's reputation, credit, income, and public confidence could be injured by the foreclosure and publicity surrounding it is not preposterous. The fact that defendant estimates its damages at an even

$1,000,000, should not be discounted for its arbitrariness, as recommended by the Magistrate. This is common pleading practice in tort claims, where the actual damages are not always liquid, tangible, and easily measured. The $1,000,000 figure cannot be considered as totally unprovable, considering the magnitude of Villa Marina's operations.

When evaluating a motion to dismiss for failure to state a claim, we must take the factual averments as true, indulging every reasonable inference helpful to the counterclaimants' cause. See Gariuta Hotel Ltd. partnership, etc. v. Ponce Federal Bank FSB, et al., 958 F.2d 15, 17 (1st Cir. 1992). See also Dartmouth Review v. Dartmouth College, 889 F.2d 13, 16 (1st Cir. 1989). Great specificity is not ordinarily required to service a Rule 12(b)(6)) motion. It is enough for a plaintiff to sketch an actionable claim by

means of "a generalized statement of facts from which the defendant will be able to frame a responsive pleading. Garita Hotel Ltd. Partnership, supra, citing 5A C. Wright & A. Miller, Federal Practice and Procedure, Section 1357 (1990). We find that Villa Marina's counterclaim has sufficiently pleaded a cause of action.

For the above-stated reasons, we decline to follow the Magistrate Judge's Report and Recommendation and DENY the Motions for Judgment on the Pleadings and to Dismiss the Counterclaim.

SO ORDERED.

At San Juan, Puerto Rico, on May 18th, 1992.

CARMEN CONSUELO CEREZO
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

CHASE MANHATTAN BANK ,

Plaintiff, ,

vs. , CIVIL 91-2464CCC

VILLA MARINA YACHT HARBOR, INC. ,

Defendant .

AMENDED ORDER

A review of our order entered on May 18, 1992 reveals that the last paragraph was inadvertently omitted. Accordingly, the May 18, 1992 order is amended to add the following:

Defendant shall deposit with the Clerk of the Court, within ten (10) days after notice, the past due mortgage payment and shall continue making such deposits as the payments come due for the duration of the litigation of this case.

The Clerk shall deposit them in an interest-bearing account.

SO ORDERED.

At San Juan, Puerto Rico, on July 1, 1992.

CARMEN CONSUELO CEREZO
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

CHASE MANHATTAN BANK ,

Plaintiff, ,

vs. , CIVIL 91-2464CCC

VILLA MARINA YACHT ,
HARBOR, INC. ,

Defendant ,

O R D E R

The Court of Appeals having upheld this Court's Order of July 1, 1992, Chase Manhattan Bank, N.A. v. Villa Marina Yacht Harbor, Inc., (Slip Op. 92-2041, 92-2051, filed Feb. 2, 1993)), Villa Marina shall comply with said order, depositing all money due to date, as well as the legal interest to date, on monies due as of July 1, 1992 within twelve (12) days after notice of this Order. Failure to comply with this Order will result in immediate

entry of judgment in favor of plaintiff and dismissal of the counterclaim.

SO ORDERED.

At San Juan, Puerto Rico, on April 23, 1993.

CARMEN CONSUELO CEREZO
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

CHASE MANHATTAN BANK ,

Plaintiff, ,

vs. , CIVIL 91-2464CCC

VILLA MARINA YACHT HARBOR, INC. ,

Defendant ,

JUDGMENT

Defendant having failed to comply with the Court's amended order of July 1, 1991, their counterclaim is hereby DISMISSED and Judgment is entered for plaintiff for all past-due mortgage payments, interest, and attorney's fees.

SO ORDERED AND ADJUDGED.

At San Juan, Puerto Rico, on May 10, 1993.

CARMEN CONSUELO CEREZO
United States District Judge

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 92-2041

IN RE

VILLA MARINA YACHT HARBOR, INC.
Petitioner

No. 92-2051

CHASE MANHATTAN BANK, N.A.
Plaintiff, Appellee,

v.

VILLA MARINA YACHT HARBOR, INC.
A/K/A VILLA MARINA YACHT HARBOUR, INC.
Defendant, Appellant

ORDER OF COURT

Entered: February 23, 1993

Upon consideration of appellant's petition for rehearing,

It is ordered that said petition be denied.

By The Court
Francis P. Scigliano
Clerk

[cc: Messrs. Rovell and Garcia-Gregory]

Supreme Court, U.S.
FILED
JUN 30 1993
OFFICE OF THE CLERK

No. 92-1883

IN THE
Supreme Court of the United States
OCTOBER TERM, 1992

VILLA MARINA YACHT HARBOR, INC.,
a/k/a VILLA MARINA YACHT HARBOUR, INC.,
Petitioner,

v.

THE CHASE MANHATTAN BANK, N.A.,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

RESPONDENT'S BRIEF IN OPPOSITION

RAFAEL R. VIZCARRONDO
JAY A. GARCÍA GREGORY
(Counsel of Record)
HERIBERTO J. BURGOS PÉREZ
FIDDLER, GONZÁLEZ & RODRÍGUEZ
G.P.O. Box 363507
San Juan, P.R. 00936-3507
(809) 753-3113
Attorneys for Respondent

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

BEST AVAILABLE COPY

QUESTIONS PRESENTED FOR REVIEW

1. Whether in a mortgage foreclosure action governed by Puerto Rico law, where the defendant acknowledged the debt and defended on the ground that the lender refused payment to trigger default, the district court improperly ordered the defendant to post payments to the court during the litigation.

2. Whether the court of appeals improperly awarded costs and attorney's fees pursuant to Fed. R. App. P. 38 for the defendant's frivolous interlocutory appeal and petition for mandamus.

LIST OF PARENT CORPORATION AND NONWHOLLY-OWNED SUBSIDIARIES

The only parent company of Respondent is The Chase Manhattan Corporation. The direct and indirect subsidiaries of Respondent (other than wholly-owned subsidiaries) are:

Banco Chase Manhattan, S.A.
Chase Automated Clearing House, Inc.
Chase Manhattan Administracao & Servicios, S.A.
Chase Manhattan Correctora de Seguras Ltda.
Chase Manhattan Financeira, S.A.
Chase Manhattan S.A. Distribuidora de Titulos e Valores Mobiliacios
Chase Paulista Participacoes, S.A.
Corporacion Falcon, Inc.
Corporacion Mexicana de Aviacion, S.A.
Credit Martiniquais
Electronic Payment Service Company (Hong Kong) Ltd.
Ims Imoveis Ltda.
O.A. Venezolano de Pulpa y Papel
Panterhaven Ltd.
Rating Agency Malaysia Berhad
Societe de Developpement Regional Antilles.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	iv
STATUTORY PROVISIONS	1
STATEMENT OF THE CASE	2
1. District Court Proceedings	2
2. Court of Appeals Decision	6
3. Post-Appeal Proceedings	6
REASONS FOR DENYING THE PETITION	8
CONCLUSION	12

TABLE OF AUTHORITIES

Federal Cases — Page

Bradley v. Campbell, 832 F.2d 1504 (10th Cir. 1987) 11
Hatch v. Reliance Ins. Co., 758 F.2d 409 (9th Cir. 1985) 11
HMG Property Investors v. Parque Industrial Río Cañas, 847 F.2d 908 (1st Cir. 1988) 9
Ruderer v. Fines, 614 F.2d 1128 (7th Cir. 1980) 11
Searcy v. Houston Lighting & Power Co., 907 F.2d 562 (5th Cir. 1990) 11
United States v. Pérez, 528 F. Supp. 206 (D.P.R. 1981) 10
Zebrowski v. Hanna, 973 F.2d 1001 (1st Cir. 1992) 9

Puerto Rico Cases

Central Vannina v. López, 259 F. 198 (1st Cir. 1919) 10
Finlay v. R. Fabián & Co., 24 P.R.R. 140; 24 P.R. Dec. 152 (1916) 10
Torres v. The District Court, 10 P.R.R. 20; 10 P.R. Dec. 21 (1906) 10

Federal Statutes

12 U.S.C. § 632 2
Fed. R. App. P. 8 6
Fed. R. App. P. 38 11
Fed. R. Civ. P. 12(c) 3
Fed. R. Civ. P. 62 6

Puerto Rico Statutes

Article 1130 of Puerto Rico's Civil Code, P.R. Laws Ann. tit. 31, § 3180 (1930) 1, 10
Article 1132 of Puerto Rico's Civil Code, P.R. Laws Ann. tit. 31, § 3182 (1930) 1

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

No. 92-1883

VILLA MARINA YACHT HARBOR, INC.,
a/k/a VILLA MARINA YACHT HARBOUR, INC.,
Petitioner,

v.

THE CHASE MANHATTAN BANK, N.A.,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

---

RESPONDENT'S BRIEF IN OPPOSITION

STATUTORY PROVISIONS

Two provisions of the Civil Code of Puerto Rico are relevant to the case. Article 1130 of the Civil Code, P.R. Laws Ann. tit. 31, § 3180 (1930), provides in pertinent part:

> If the creditor to whom payment has been made should refuse to accept it, without reason, the debtor shall remain released from all liability by the consignation of the things due.

Article 1132 of the Civil Code, P.R. Laws Ann. tit. 31, § 3180, provides in pertinent part:

> Consignation shall be made by depositing the things due at the disposal of the judicial authority before whom the tender shall be proven. . . .

STATEMENT OF THE CASE

1. *District Court Proceedings.*

On November 22, 1991, respondent The Chase Manhattan Bank, N.A. ("Chase"),[1] filed a complaint for collection of monies and foreclosure of mortgage against petitioner Villa Marina Yacht Harbor, Inc. ("Villa Marina"). The complaint, brought under 12 U.S.C. § 632 (jurisdiction of U.S. courts in cases involving banking in a dependency or insular possession of the U.S.) and governed by Puerto Rico law, alleged that Villa Marina had defaulted on the mortgage note by failing to make timely payments due on October 1st and November 1st, 1991. The complaint requested appointment of a receiver.

On December 27, 1992, Villa Marina filed a verified opposition to the appointment of a receiver. (Record or "R." 21-28). On January 10, 1992, Villa Marina filed its answer to the complaint (R. 39-43). Villa Marina admitted that it owed Chase the principal and interest pleaded in the complaint but denied that it was in default. (Pet. App., or "A." 40: "it is admitted that VILLA MARINA owes CHASE the principal sum and interest therein pleaded".) Villa Marina also counterclaimed against Chase.

Villa Marina characterized its default to the mortgage note as "manufactured" and "fictitious" and the filing of the complaint as "the culmination of a pattern of harassment and oppression designed to financially crush VILLA MARINA." (R. 42.) Chase allegedly "manufactured" Villa Marina's default by refusing to accept tendered payments for October and November 1991, all in order to force a foreclosure. (R. 31-33.) Villa Marina described how Chase "manufactured" its default as follows:

---

[1] For respondent's statement under Rule 29.1, see page ii, *supra*.

> On October 1991, one month after the penalty payment to CHASE of $28,000.00 in attorney's fees, VILLA MARINA was delayed in the payment for that month. CHASE *immediately* filed a foreclosure suit and returned a check for said month that VILLA MARINA had sent to CHASE. VILLA MARINA then sent two (2) checks for the months of October and November and both were returned by CHASE. . . . It is clear that CHASE is looking for every opportunity to create a default in order to deprive FERRER [2] of the marina or of the control of the marina. All of it because of spite.
>
> Thus when the bank filed the complaint only the payment corresponding to the month of October had been slightly delayed a few days. The payment for November was timely received and returned by CHASE. The filing of the complaint together with a petition for receivership because of any such delay in the payment of one month when payment for said month, together with payment for the next month, was tendered to CHASE, is clear evidence of CHASE's spite and bad faith against defendant. (Emphasis in original.) (R. 31-33.)[3]

In view of Villa Marina's admission that it owed the principal and interest claimed in the complaint, on February 10, 1992, Chase moved for a partial judgment on the pleadings under Fed. R. Civ. P. 12(c). Chase also moved to dismiss Villa Marina's counterclaim. A hearing was held before U.S. Magistrate-Judge Arenas on February 28, 1992, to argue, among other things, Chase's dispositive motions.

---

[2] Eduardo Ferrer Bolívar is Villa Marina's President and sole stockholder. (R.21.)

[3] The record shows, to the contrary, that Chase had tried to accommodate Villa Marina. Prior to Villa Marina's 1991 default, Villa Marina had missed payments in 1990; after filing a foreclosure action in state court, Chase reinstated the mortgage upon receipt of past-due payments and fees. (R. 23-24.)

On March 12, 1992, the magistrate issued a Report and Recommendation favoring the granting of Chase's dispositive motion. Among other things, the magistrate noted that Villa Marina's defense—Chase's alleged improper rejection of its October and November 1991 payments—was unavailing, because Villa Marina did not consign these payments in court:

> Defendant now raises a number of issues peripheral to the seminal one, that is, the action on the note and the foreclosure of mortgage. However, in relation to the failure to make payments for the months of October and November, 1991, defendant states that the checks were returned by Chase, alleging that the return of the payments shows that Chase is looking for every opportunity to create a default in order to deprive defendant Mr. Ferrer of control of the marina, all because of spite. The law provides for a remedy for this rejection of payment and the record does not disclose that defendant has consigned these two payments, or for that matter any subsequent payments, so that Chase is correct and, regardless of its rejection of two payments, defendant is in default. *One of the payments was late and the other may not have been, but consignment is necessary if a late payment is rejected.* Had defendant consigned the payments, it would have been released from liability for lack of payment. *See* 31 L.P.R.A. § 3180. Regardless of the quagmire of facts and issues which are the subject of the counterclaim, those do not gainsay the precise failure to make the two rejected payments. (Emphasis added.) (R. 93.)

Neither at the hearing before the magistrate nor in its objections to the Report and Recommendation did Villa Marina explain why it had failed to consign the October and November payments allegedly refused by Chase. Likewise, Villa Marina did not later offer to consign the past-due payments or the future monthly mortgage payments during the litigation. In other words, Villa Marina made no attempt to preserve its defense of proper tender

of payment and no offer to preserve the *status quo* during the suit.

Villa Marina did not proffer any evidence that it was unable to deposit such payments in court. To the contrary, Villa Marina's evidence showed that its President and sole stockholder had over $1.0 million in cash available to invest in Villa Marina and that his management of its operations was "outstanding." (R. 27 and 29.) And after the magistrate issued the Report and Recommendation, Villa Marina raised only procedural objections, complaining that it "was not provided with notice, discovery, or a hearing, upon the Magistrate's election to convert plaintiff's Rule 12 motion into a motion for summary judgment." March 27, 1992 Objections to Report and Recommendation, at p. 2.

On May 18, 1992, the district court declined the magistrate's recommendation to enter judgment in favor of Chase and dismiss Villa Marina's counterclaim (A. 19-29). Instead, further litigation was required because of factual disputes. On July 1, 1992, the district court amended its May 18 order to add a paragraph it had "inadvertently omitted." (A. 30.) The amended order directed Villa Marina to deposit in court its past-due mortgage payments, including those allegedly "rejected" by Chase, and to continue making such deposits as they became due during the litigation. (A. 30-31.)

Villa Marina subsequently filed a motion to alter or amend the July 1, 1992 order on the sole ground "that there [was] no provision in the Federal Rules authorizing the Court to order Villa Marina to pay any amount during the pendency of this action." (R. 166.) The motion was denied by the district court on August 5, 1992. (R. 181.) On August 21, 1992, Villa Marina filed its notice of appeal.

Villa Marina did not comply with the order or move for a stay pending appeal, either in the district court

(Fed. R. Civ. P. 62) or in the court of appeals (Fed. R. App. P. 8). On August 31, 1992, Chase moved the district court for an order to show cause why Villa Marina should not be held in contempt. (R. 182-89.) Villa Marina did not respond to Chase's motion or otherwise plead *any* facts excusing its refusal to follow the order of the district court.

2. *The Court of Appeals Decision.*

On February 2, 1993, the court of appeals affirmed the order, concluding that it was "wholly within the administrative powers of the district court and did not constitute an abuse of discretion." (A. 11.) The court stated that it was "at a loss to understand why Villa Marina opposes the order" (A. 12), given its admission that it owed the money and its explicit offer "to post the funds directly to Chase *if* Chase reinstates the mortgage and Villa Marina is allowed to pursue its counterclaim." (A. 13 and R. 166.) In these circumstances, the court concluded, the order "directing [Villa Marina] to deposit the monthly mortgage payments into an interest bearing court account as they become due would not be unusual; in fact it would be routine." (A. 11.) The court added: "The order is a paradigm case of preserving the *status quo* with no harm to either party pending a hearing on the merits." (A. 13.) Finally, "[b]ecause Villa Marina had advanced no plausible reason for this appeal," the court found the appeal "frivolous" and awarded costs and fees. (A. 13.)

3. *Post-Appeal Proceedings.*

On March 11, 1993, after rehearing was denied, the mandate issued. On April 15, 1993, Chase moved for the second time for an order to show cause why Villa Marina should not be held in contempt. By this time, Villa Marina had enjoyed the use of its income derived from the mortgaged property (a marina for luxury yachts) for

more than 1½ years without making a single payment of interest and principal.[4]

On April 23, 1993, and for the first time since entry of the July 1, 1992 order (A. 30-31), Villa Marina moved for a stay—pending the filing of the instant petition. Mischaracterizing the July 1, 1992 order as a judgment, Villa Marina argued that it could not comply because the "RTC [Resolution Trust Corporation] obtained an order of attachment of all the assets of Villa Marina" and its owner "did not have the ability to make the payments." April 23, 1993 Motion to Stay Execution of Judgment, at 2-3. Meanwhile, on that same date, the district court ordered Villa Marina to comply with its July 1, 1992 order by depositing all money due to date, with legal interest, within 12 days after notice. Absent compliance, the court said, judgment would issue for Chase. (A. 32-33.) The order was received by Villa Marina on April 30, 1993. *See* Villa Marina's May 14, 1993 Informative Motion at 1.

Chase responded to Villa Marina's motion for stay on April 29, 1993. Chase apprised the district court of the fact that, contrary to Villa Marina's assertion (the same incorrect assertion made in the Petition at 27-28), its assets were *not* frozen by the RTC and that it had continued to receive rents from boat slips throughout the proceedings. Chase also stated that although it had been assigned certain of Villa Marina's leases, it had not enforced the assignment, precisely so that Villa Marina would have no valid excuse to avoid complying with the district court's order.

On May 7, 1993, the district court denied Villa Marina's motion for stay and, as promised, granted judgment to Chase. (A. 34.) The order, which was not reproduced in the Appendix, states as follows:

---

[4] The last monthly payment of principal and interest made by Villa Marina as stipulated in the mortgage note was the one due on September 1, 1991.

> *Order*: On July 1, 1992, the Court entered an amended order, *not* a judgment, requiring defendant to deposit with the Clerk, within 10 days after notice, the past due mortgage payments and all payments that become due during this lawsuit. This is nothing but a motion to reconsider that order and to inform of defendant's non-compliance after nine months after its entry. However, since the Court is entering for the first time today judgment in favor of the plaintiff and there being no objection by them to the stay once judgment was issued, the execution of the Judgment of May 7, 1993 is stayed. (Emphasis in original.)[5]

Villa Marina filed a motion to alter or amend the judgment on May 10, 1993. (Pet. 9.) The district court has not ruled on that motion. An appeal from the judgment has not been taken.

REASONS FOR DENYING THE PETITION

The petition raises three issues: the appealability of the district court's July 1, 1992, order; the propriety of that order; and the propriety of the appellate court's award of costs and fees on appeal. None of these issues remotely warrants this Court's consideration. The petition should therefore be denied.

1. Villa Marina first argues that certiorari should be granted to establish that the July 1, 1992 order was appealable, asserting that "[t]he First Circuit's decision in this case is at odds with the Second Circuit's" holdings that "an order requiring a litigant to place property into custody is appealable as an injunction." (Pet. 12-13.) No appealability issue, however, is properly presented in this case. The First Circuit's decision did not reject Villa Marina's argument for appealability, and the decision cannot conflict with any pro-appealability rulings in the Second Circuit, because the First Circuit reviewed the dis-

[5] Judgment was actually entered on May 10, 1993. (A. 34.)

trict court order on its merits. In fact, the court of appeals *expressly* declined to render any opinion on the appealability question. (A. 11-12.)

Beyond that, it is unclear what Villa Marina seeks. It is hardly in a position to dispute appellate jurisdiction over its own appeal and, indeed, does not do so, arguing instead that the July 1, 1992 order *was* appealable. Yet this Court's acceptance of that view would merely lead to a remand for consideration of the merits of the appeal —which the court of appeals has already done, rejecting Villa Marina's claims. The petition thus requests relief on this issue that could not benefit petitioner.

2. Villa Marina next argues that the entry of the July 1, 1992 order violated its due process rights, alleging lack of notice and an opportunity to be heard as well as inability to pay the ordered sums. (Pet. 13-19.) But Villa Marina does not and cannot point to any part of the First Circuit's decision that announces any legal conclusion contrary to Villa Marina's submissions on the requirements of due process. That is hardly surprising. As the First Circuit explained, the crux of Villa Marina's challenge in the court of appeals was the alleged absence of authority to issue the order (a challenge not pursued in this Court), not any due-process argument. (A. 7.) The lack of any significant legal ruling on the due-process issue raised in the petition is reason enough to deny review.

In any event, Villa Marina's due-process arguments are without merit. As for notice and a hearing, Villa Marina cannot claim either surprise or the denial of a necessary opportunity to contest the order. As the First Circuit explained, the order was one merely "preserving the *status quo* with no harm to either party" and, far from coming as a surprise, "would be routine" in these circumstances. (A. 11-13.) *Zebrowski v. Hanna*, 873 F.2d 1001, 1003-05 (1st Cir. 1992); *HMG Property Investors v. Parque Industrial Río Cañas*, 847 F.2d 908,

915-916 (1st Cir. 1988). Nor was there a factual issue raised warranting a hearing. Villa Marina not only admitted that it owed the sums involved but actually offered to post the funds. (A. 12.) Thus, the First Circuit confessed its inability to "understand why Villa Marina opposes the order," because "Villa Marina has received all it requested." (A. 12-13.) In brief, once the question of *authority* to enter the order was answered, Villa Marina simply had no objection that could justify any hearing.

Villa Marina's claim of unfair process is further undermined by the particular course of proceedings in the case. Villa Marina's own defense—that Chase triggered the default by improperly rejecting mortgage payments—plainly put it on notice that consignment would be required, because consignment is a well-recognized precondition of the defense under Puerto Rico law.[6] This requirement, moreover, hardly passed unnoticed prior to the July 1 order: it was central to the proceedings before and the decision of the magistrate; and although the district court held that the failure to consign was not a basis for *judgment* for Chase, it said nothing to deny the plain requirement of the defense. By the time the district court ordered the consignment, then, Villa Marina had been fully placed on notice and had been afforded ample opportunity to dispute consignment on any factual ground that could require a hearing—which Villa Marina never

---

[6] Article 1130 of Puerto Rico's Civil Code, P.R. Laws Ann. tit. 31 § 3180 (1930); *United States v. Pérez*, 528 F. Supp. 206, 209 (D.P.R. 1981); *Central Vannina v. López*, 259 F. 198, 200 (1st Cir. 1919) (consignation is a mode provided by law to obtain a discharge from the obligation); *Torres v. The District Court*, 10 P.R.R., 20, 22; 10 P.R. Dec. 21, 23 (1906) (consignation pursuant to Article 1144 [Civil Code, 1902, now article 1130, rev. 1930], is equivalent to compliance with the obligation to pay); *Finlay v. R. Fabián & Co.*, 24 P.R.R. 140, 145; 24 P.R. Dec. 152, 156-57 (1916).

did.[7] And *after* entry of the order, Villa Marina received repeated opportunities to contest it *before* it was ever enforced: by the time the July 1992 order was enforced in May 1993 (after 9½ months of non-compliance), Villa Marina not only had filed a motion to alter or amend the order but had received a full appeal. Thus, before any money actually had to be paid over, Villa Marina had full judicial review of any objections it wished to raise. There was no lack of due process.

As for Villa Marina's asserted inability to pay, it is sufficent to note that Villa Marina never raised the possibility that it was unable to comply with the order until after the First Circuit decided the case. To the contrary, not only did its owner boast that it had $1.0 million in cash available to invest in the marina, but Villa Marina explicitly offered to make the payments to Chase. (A. 12.) Of course, to the extent that Villa Marina is complaining about the district court's enforcement of the July 1992 order and entry of judgment on remand from the First Circuit's decision, such complaints are premature: they can have no bearing on the First Circuit decision presented for review in Villa Marina's present petition.

3. Villa Marina finally challenges the *sua sponte* award of costs and fees for the frivolous appeal. (Pet. 23-28.) But Villa Marina neither does nor can point to any other court that has disputed the power to impose sanctions under Fed. R. App. 38 *sua sponte*. *See, e.g., Searcy v. Houston Lighting & Power Co.*, 907 F.2d 562 (5th Cir. 1990). And due process is satisfied by the sanctioned party's opportunity—which Villa Marina had and pursued—to seek rehearing before the sanction order

---

[7] In addition, between the May 18, 1992 order of the district court and the July 1st amendment ordering the consignment, Chase expressly raised the consignment issue with the district court, providing additional notice to Villa Marina. (R. 65-70.)

takes effect. *See Bradley v. Campbell*, 832 F.2d 1504 (10th Cir. 1987); *Hatch v. Reliance Ins. Co.*, 758 F.2d 409 (9th Cir. 1985); *Ruderer v. Fines*, 614 F.2d 1128 (7th Cir. 1980).

CONCLUSION

The Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

RAFAEL R. VIZCARRONDO
JAY A. GARCÍA GREGORY
(Counsel of Record)
HERIBERTO J. BURGOS PÉREZ
FIDDLER, GONZÁLEZ & RODRÍGUEZ
G.P.O. Box 363507
San Juan, P.R. 00936-3507
(809) 753-3113
Attorneys for Respondent

Dated: June 30, 1993